Ruan Transport Corp. *and* Chauffeurs, Teamsters and Helpers Local Union No. 215 a/w International Brotherhood of Teamsters, AFL–CIO, Petitioner. Case 25–RC–9360

November 15, 1994

DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

The National Labor Relations Board, by a three-member panel, has considered an objection to an election held May 2, 1994, and the Regional Director's report recommending disposition of it.[1] The election was conducted pursuant to a stipulated election agreement. The tally of ballots shows seven for and nine against the Petitioner with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the Regional Director's findings and recommendations, and finds that the election must be set aside and a new election held.

The Employer runs a trucking operation from its Boonville, Indiana facility. The bargaining unit consists of approximately 19 truckdrivers at the Boonville facility. As noted above, the election took place on Monday, May 2, 1994. The Employer received the Board's official election notices on the morning of Thursday, April 28, and posted them at that time.

In its Objection 1, the Petitioner contended that the election must be set aside because the election notices were posted less than 3 full working days prior to the date of the election as required under Section 103.20 of the Board's Rules and Regulations.[2] Since the Employer acknowledged that it did not post the election notices until the morning of Thursday, April 28, the Regional Director found that the Employer did not satisfy the 3-day posting requirement of Section 103.20.[3] The Regional Director further found that the Employer did not notify the Regional Office of nonreceipt of the notices as the Rule requires.

The Employer excepts on the ground that it was denied due process because the Regional Director failed to permit it to present evidence during the investigation as to whether the election notices were timely posted and failed to hold a hearing on this issue. The Employer contends that if it had been allowed to present evidence, it would have shown that because it operates 7 days a week, Saturdays and Sundays are ''working days'' and thus that it satisfied the requirements of Section 103.20 because the notices were posted for 3 full working days prior to the Monday, May 2 election.[4] The Employer argues, in effect, that the issue here, whether the Board should consider Saturdays and Sundays to be ''working days'' within the meaning of Section 103.20(b) when an employer operates 7 days a week, is the type of issue that the Board should consider on a case-by-case basis. Thus, the Employer contends that the Regional Director erred in not considering this issue before applying Section 103.20. We find these arguments without merit.

The Board adopted Section 103.20 in 1987 to ''facilitate the election process and eliminate litigation over the issue of the appropriate time period for posting an election notice.'' 52 Fed.Reg. 25213 (1987). Although it was suggested that the Board apply different posting periods for industries in which employees did not work a normal 5-day workweek, the Board rejected the proposal because it was ''reluctant to complicate the rule by establishing different posting periods for different industries.'' Id. at 25214. In a similar vein, the Board also rejected the suggestion that the time period for posting should be described in terms of hours, ''because requiring consecutive hours does not allow for Saturdays, Sundays, and holidays'' which the Board specifically excluded from the definition of ''working day.'' Ibid. Thus, by proposing to apply an uncomplicated rule of general application according to its literal terms, the Board sought to eliminate litigation over the issue of whether election notices were timely posted. Although the Board did state that certain issues would still have to be litigated, it contemplated as litigable such issues as whether *timely* posted notices had been tampered with, not whether the notices themselves had been timely posted. Ibid. Thus, we cannot agree with the Employer that the Board left open for later consideration, and litigation,

[1] The Regional Director also approved the Petitioner's request to withdraw its Objections 2 and 3 and, because of her disposition of Objection 1, found it ''unnecessary to resolve the issues of fact, credibility, or law raised by Objection 4.''

On June 15, 1994, the Employer filed with the Regional Director a motion for reconsideration. The Regional Director denied the motion on July 7, 1994.

[2] Sec. 103.20 provides that the Board's official notices of election must be posted in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. The Rule also provides that the term ''working day'' shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The Rule further provides that the employer shall be conclusively deemed to have received copies of the election notice unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice. Lastly, the Rule also states that failure to post the election notices as required shall be grounds for setting aside the election whenever proper objections are filed.

[3] In so finding, the Regional Director stated that the Employer ''acknowledged'' that the ''Notice was not posted for the required 3 working days prior to the election.'' The Employer excepts on the ground that it made no such acknowledgment. In sustaining the Petitioner's objection, we do not rely on this statement by the Regional Director.

[4] Also, counting Saturdays and Sundays as working days, it argues that it could not have notified the Region 5 working days before the election that it had not received the notices because the Region's offices were closed because of the death of former President Nixon on Wednesday, April 27, the date it claims was 5 working days prior to the election.

whether Saturdays, Sundays, and holidays should be considered ''working days'' within the meaning of Section 103.20(b). This is precisely the type of litigation that the Board sought to foreclose by enacting Section 103.20.

Finally, although it is unfortunate that the Employer did not receive the election notices until April 28,[5] it did not notify the Region at least 5 working days prior to the election that it had not received the election notices.[6] For all these reasons, we find the Employer's exceptions to be without merit. Accordingly, as noted above, we shall set aside the first election and direct that a second election be held.

[Direction of Second Election omitted from publication.]

[5] The Employer claims that the Region mailed the election notices to the Employer on April 26 and, because Federal postal offices were closed on April 27 because of the death of former President Nixon, the Employer did not receive the election notices until April 28. In this regard, we note that since April 27 was a Federal holiday, the Employer would have had to post the election notices on April 25, not April 26 as stated by the Regional Director, in order to satisfy Sec. 103.20's requirement that the notices be posted for 3 full working days prior to the date of the election.

[6] Since we have rejected the Employer's argument that Saturdays and Sundays are to be considered ''working days,'' we reject its claim that Wednesday, April 27 was 5 working days before the election and that the Region's closing on April 27 prevented it from giving proper notice to the Region of nonreceipt of the notices. We are not suggesting, however, that the Employer acted in bad faith by failing to so notify the Region. There is no evidence that the Employer has not acted in good faith here, but we note such considerations do not affect the application of Sec. 103.20. See *Smith's Food & Drug*, 295 NLRB 983 fn. 1 (1989).